IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1302 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NIRANJAN ISWARLAL DAVE

Versus

GITABEN D/O.LABHSHANKER OKHARAM JOSHI

Appearance:

MR NAGIN N GANDHI for Petitioner

MR AD SHAH for Respondent No. 1

MR KP RAVAL, ADDL. PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 02/05/2000

ORAL JUDGEMENT

1. This is an application u/s 482 of the Criminal Procedure Code at the instance of the original accused in respect of the process issued by the learned Magistrate

in Criminal Case No.5453/88 on the basis of a complaint filed by the respondent No.1 herein, alleging that the accused has committed offence against her u/s 495, 496 and 420 of the Indian Penal Code.

2. Learned counsel for the petitioner in substance has contended that the process issued by the learned Magistrate deserves to be quashed inasmuch as the continuation of the proceedings would amount to an abuse of the process of law, inasmuch as the complaint on the face of it does not disclose any commission of the offence on part of the accused.

3. I shall first deal with the legal and technical contentions raised by the learned counsel for the petitioner herein before adverting to the specific contents and allegations made in the complaint.

4. Learned counsel for the petitioner contends that the entire basis and the root of the complaint filed by his wife is her belief, and mere belief that the accused was married earlier, that he had not divorced his first wife, and keeping this fact concealed and/or suppressed, had contract marriage with the complainant. It is contended that this belief, as spelt out in para 4 of the complaint, arises from mere information received by the complainant that the former wife of the accused has filed an application u/s 125 of the Criminal Procedure Code against the present accused, which application was pending in Court on the date when the complaint was filed. In this context, learned counsel for the petitioner points out that even if it be assumed that there was a pending application against the accused u/s 125 of the Criminal Procedure Code, the same would not legitimately give rise to any inference that the accused had not divorced his first wife, and by suppressing this fact, had contracted a second marriage with the complainant, inasmuch as an application u/s 125 of the Criminal Procedure Code is maintainable even at the instance of a divorced wife. Be that as it may, even if we assume that the learned counsel for the petitioner is technically correct in submitting that an application u/s 125 is maintainable even at the instance of a divorced wife, the basic reference to the pendency of this application, as referred to in the complaint, only furnishes the reasons for the belief held by the complainant as to the legal existence of the first marriage when the accused contracted the second marriage with the complainant. It is well established that the complaint need not be in any particular form, and it was neither essential in law, nor necessary in fact for the

complainant to set out the reasons why the complainant believes that she was deceived and induced to marry the accused, although the marriage of the accused with his former wife was subsisting.

4.1 No doubt, the complaint also mentions that the accused had made a representation to the complainant and the complainant's family before their marriage, while they were negotiating for the marriage, that he had divorced his first wife, and if necessary, he would show them the necessary documents on stamp paper. Obviously the accused was bound to have made some representation and a reference to his former marriage inasmuch as admittedly he had a minor daughter from his former marriage, and as the complainant states in the complaint, the reason put forward by the accused for contracting the second marriage with the complainant was that his minor daughter needs the care and affection of a mother. The relevant point in this context at this stage, is not whether the earlier marriage between the accused and his former wife was legally dissolved or not, but whether the complainant has sufficient reasons to believe that the same was not dissolved, and asserts out of her own knowledge that such subsisting marriage was concealed from her and her family members in order to deceive her and to induce her to enter into a marriage with the accused.

5. Learned counsel for the petitioner further contends that a plain reading of section 495, 496 and 420 of the IPC, when seen in the context of the assertions made in the complaint, could not possibly amount to any of these offences. Be that as it may, it is also well recognized that ultimately when a charge is framed, the trial Court is not confined to framing the charge in respect of the sections narrated in the complaint or asserted by the complainant, but the charge would be framed on the basis of the facts alleged. It would therefore be open on the facts alleged in the complaint for the trial Court also to frame a charge u/s 493 and 494 of the IPC.

6. It was also submitted by learned counsel for the petitioner that, u/s 198 of the Criminal Procedure Code, only the first wife can file a complaint in respect of the offences under Chapter 20 of the IPC, and the second wife cannot do so. This contention is recorded only for being rejected, inasmuch as the same runs quite contrary to the specific language used by the statute in sections 493, 494 and 495 of the IPC.

7. At this stage, it is also irrelevant as to whether the accused had in fact divorced his first wife and as to whether such divorce was legal and valid. Learned counsel for the petitioner at this stage states that the said divorce was a customary divorce, and recorded by way of an agreement between the parties and executed on a stamp paper, and that the same was not a divorce by any decree of any court. Thus, the moot question which may ultimately have to be decided by the trial Court is as to whether such divorce was in fact obtained or not, and if obtained, whether the same was legal and valid. However, at this stage, the question is merely academic.

8. Learned counsel for the petitioner sought to place reliance upon the decision of the Supreme Court in the case of R.P.Kapur v/s State of Punjab reported in AIR 1960 SC 866, and particularly the observations made in para 6 therein. The relevant observations merely deal with inherent power of the High Court u/s 561[A] of the Criminal Procedure Code (the old Code), and reiterate the well established principle that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction.
[Emphasis supplied]

It is in the context of this legal position that the assertions and averments made in the complaint need to be examined.

8.1 The complainant has asserted in the complaint that the accused came into social contact with the complainant and the complainant's family, and ultimately, the accused after having won the confidence of the complainant's family, had putforth a proposal for marriage with the complainant. The reason given by the accused was that he had a child by the name of Sweetu and that this child required the care and affection of a mother, that the complainant's father had inquired about the former marriage of the accused whereupon the accused had stated that he has obtained a divorce from his former wife by the name of Bhavna, and "if necessary" he will show the stamp paper. The complainant then asserts that

the accused had shown her father some document on a stamp paper pertaining to divorce between the accused and his former wife.

8.2 Thereafter, the relevant assertions in the complaint state that, in August 1988, the complainant had to go to Ahmedabad, and the complainant insisted on accompanying him to Ahmedabad, whereupon the accused said that he is facing a false prosecution, and therefore he has to attend the Court, and the complainant cannot go with him to the Court, and therefore, the complainant did not accompany the accused to Ahmedabad. The complainant's father then talked to his friend one Mangaldas Patel and requested him to inquire as to proceedings in the Court which inquiry revealed that at Ahmedabad, in the 17th Court, a maintenance application has been filed against the accused by his former wife Bhavnaben, and that the inquiry did not reveal that there was any divorce between them. The complainant therefore specifically asserts that, on account of these reasons, the accused had falsified the facts pertaining to his earlier marriage, suppressed the truth, made a representation to the complainant and her family, cheated them, and induced the complainant and her family to enter into a marriage with the accused. The complainant further asserts in the complaint that because of this, the accused has started ill-treating the complainant, and although the complainant was pregnant through the accused, the accused pressurized her to undergo a Medical Termination of Pregnancy on the ground that his former child Sweetu is very young, and this is not the occasion for incurring the burden of a second child. In fact, these are the material and relevant allegations made in the complaint.

8.3 On these allegations, it is not possible to come to a conclusion, as urged by learned counsel for the petitioner, that no offence can possibly be made out. Suffice it to say that, for the purpose of exercising this Court's powers u/s 482, for the purpose of quashing the process issued on the basis of a complaint against the accused, what is required to be seen is not whether a conviction would result if the complaint were pursued to its logical conclusion, but whether conviction would be impossible to record on the facts asserted in the complaint. In my view, this is precisely what the Supreme Court conveyed in para 6 of the decision in the case of R.P.Kapur [supra].

9. In the premises aforesaid, I do not see any justification for quashing the process which is a prayer

made by the applicant herein. This application is therefore dismissed and rule is discharged. Interim relief stands vacated.

Direct service is permitted even to the respondent.

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